

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JORGE AVILA,

Plaintiff,

v.

F. TUVERA, et al.,

Defendants.

No. C 15-01265 BLF (PR)

**ORDER OF SERVICE; DIRECTING
DEFENDANTS TO FILE
DISPOSITIVE MOTION OR NOTICE
REGARDING SUCH MOTION;
INSTRUCTIONS TO CLERK**

Plaintiff, a state prisoner currently incarcerated at California State Prison-LA, filed this *pro se* civil rights action pursuant to 42 U.S.C. § 1983 against medical officials at Salinas Valley State Prison ("SVSP"). He initiated this action on March 18, 2015 by filing a complaint, (Docket No. 2), and an application to proceed *in forma pauperis*, (Docket No. 1). On April 29, 2015, before the Court had screened the initial complaint, Plaintiff filed a first amended complaint ("FAC") which failed to meet the minimum pleading requirements to state a § 1983 claim. The Court dismissed the FAC with leave to amend to attempt to correct the deficiency. (Docket No. 12.) In the alternative, Plaintiff was directed to file notice that he wished to strike the FAC and proceed with the initial complaint. (*Id.*)

Plaintiff has informed the Court that he chooses the alternative course, *i.e.*, to

1 strike the FAC and proceed on the initial complaint. (Docket No. 18.) The notice was
 2 entitled "Second Amended Complaint" and is accompanied by claims against the five
 3 defendants in Plaintiff's initial complaint. For the sake of efficiency, the Court will deem
 4 the document a SUPPLEMENTAL COMPLAINT and treat it accordingly. Pursuant to
 5 Plaintiff's request, the Court STRIKES the first amended complaint. (Docket No. 11.)
 6 The Court will screen the initial complaint under 28 U.S.C. § 1915A, along with the
 7 supplement thereto.

8 9 DISCUSSION

10 A. Standard of Review

11 A federal court must conduct a preliminary screening in any case in which a
 12 prisoner seeks redress from a governmental entity or officer or employee of a
 13 governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify
 14 any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a
 15 claim upon which relief may be granted or seek monetary relief from a defendant who is
 16 immune from such relief. *See id.* § 1915A(b)(1),(2). *Pro se* pleadings must, however, be
 17 liberally construed. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.
 18 1990).

19 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
 20 elements: (1) that a right secured by the Constitution or laws of the United States was
 21 violated, and (2) that the alleged violation was committed by a person acting under the
 22 color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

23 B. Plaintiff's Claims

24 Plaintiff claims that during his incarceration at SVSP since September 30, 2013,
 25 through the time he filed this action, he received inadequate medical treatment for
 26 hemorrhoids. (Docket No. 2.) Plaintiff claims that Defendants F. Tuvera, K. Kumar, J.
 27 Dunlap, A. Austria, and D. Tyler were deliberately indifferent to his serious medical
 28 needs by delaying treatment. (*Id.*; Docket No. 18.) Liberally construed, Plaintiff's claims

are cognizable as a violation of the Eighth Amendment's proscription against cruel and unusual punishment. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), *overruled on other grounds*, *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc).

CONCLUSION

For the reasons stated above, the Court orders as follows:

1. The Clerk of the Court shall mail a Notice of Lawsuit and Request for Waiver of Service of Summons, two copies of the Waiver of Service of Summons, a copy of the complaint, (**Docket No. 2**), all attachments thereto, a copy of the supplemental complaint, (**Docket No. 18**), and a copy of this order upon **Defendants Dr. Fernando Tuvera, Dr. K. Kumar, Dr. J. Dunlap, Dr. A. Austria, and Dr. D. Tyler at Salinas Valley State Prison**, (P.O. Box 1050, Soledad, CA 93960). The Clerk shall also mail a copy of this Order to Plaintiff.

2. Defendants are cautioned that Rule 4 of the Federal Rules of Civil Procedure requires them to cooperate in saving unnecessary costs of service of the summons and the complaint. Pursuant to Rule 4, if Defendants, after being notified of this action and asked by the Court, on behalf of Plaintiff, to waive service of the summons, fail to do so, they will be required to bear the cost of such service unless good cause shown for their failure to sign and return the waiver form. If service is waived, this action will proceed as if Defendants had been served on the date that the waiver is filed, except that pursuant to Rule 12(a)(1)(B), Defendants will not be required to serve and file an answer before **sixty (60) days** from the day on which the request for waiver was sent. (This allows a longer time to respond than would be required if formal service of summons is necessary.) Defendants are asked to read the statement set forth at the foot of the waiver form that more completely describes the duties of the parties with regard to waiver of service of the summons. If service is waived after the date provided in the Notice but before Defendants have been personally served, the Answer shall be due **sixty**

1 **(60) days** from the date on which the request for waiver was sent or **twenty (20) days**
2 from the date the waiver form is filed, whichever is later.

3 3. No later than **ninety (90) days** from the date of this order, Defendants shall
4 file a motion for summary judgment or other dispositive motion with respect to the claims
5 in the complaint found to be cognizable above.

6 a. Any motion for summary judgment shall be supported by adequate
7 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
8 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor
9 qualified immunity found, if material facts are in dispute. If any Defendant is of the
10 opinion that this case cannot be resolved by summary judgment, he shall so inform the
11 Court prior to the date the summary judgment motion is due.

12 b. **In the event Defendants file a motion for summary judgment, the**
13 **Ninth Circuit has held that Plaintiff must be concurrently provided the appropriate**
14 **warnings under *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See**
15 ***Woods v. Carey*, 684 F.3d 934, 940 (9th Cir. 2012).**

16 4. Plaintiff's opposition to the dispositive motion shall be filed with the Court
17 and served on Defendants no later than **twenty-eight (28) days** from the date Defendants'
18 motion is filed.

19 Plaintiff is also advised to read Rule 56 of the Federal Rules of Civil Procedure
20 and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (holding party opposing summary
21 judgment must come forward with evidence showing triable issues of material fact on
22 every essential element of his claim). Plaintiff is cautioned that failure to file an
23 opposition to Defendants' motion for summary judgment may be deemed to be a consent
24 by Plaintiff to the granting of the motion, and granting of judgment against Plaintiff
25 without a trial. See *Ghazali v. Moran*, 46 F.3d 52, 53–54 (9th Cir. 1995) (per curiam);
26 *Brydges v. Lewis*, 18 F.3d 651, 653 (9th Cir. 1994).

27 5. Defendants *shall* file a reply brief no later than **fourteen (14) days** after
28 Plaintiff's opposition is filed.

1 6. The motion shall be deemed submitted as of the date the reply brief is due.
2 No hearing will be held on the motion unless the Court so orders at a later date.

3 7. All communications by the Plaintiff with the Court must be served on
4 Defendants, or Defendants' counsel once counsel has been designated, by mailing a true
5 copy of the document to Defendants or Defendants' counsel.

6 8. Discovery may be taken in accordance with the Federal Rules of Civil
7 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or
8 Local Rule 16-1 is required before the parties may conduct discovery.

9 9. It is Plaintiff's responsibility to prosecute this case. Plaintiff must keep the
10 court informed of any change of address and must comply with the court's orders in a
11 timely fashion. Failure to do so may result in the dismissal of this action for failure to
12 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

13 10. Extensions of time must be filed no later than the deadline sought to be
14 extended and must be accompanied by a showing of good cause.

15 **IT IS SO ORDERED.**

16
17 DATED: August 7, 2015


BETH LABSON FREEMAN
United States District Judge